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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

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PATRICK MACINTYRE et al.,  
  
Plaintiffs and Appellants,  
  
v.  
  
CITY NATIONAL BANK et al.,  
  
Defendants and Respondents.

C049855  
  
(Super. Ct. No.  
02AS06841)

Plaintiffs Patrick MacIntyre and David Margen were high bidders of \$430,100 at a nonjudicial foreclosure sale of real property. However, after the auction and before issuance of a new deed, defendants Integrated Lender Services, Inc. (ILS), the trustee, set aside the sale because there had been a procedural irregularity in the auction. ILS had improperly disqualified a bidder. ILS held a new auction and sold the property to Realty Advisors for \$615,000.

Plaintiffs sued ILS, along with City National Bank (CNB), the beneficiary under the deed of trust, alleging numerous

causes of action to obtain the benefit of the first sale. The trial court, however, granted summary judgment in favor of ILS and CNB. It found that setting aside the first sale was proper as a matter of law under the undisputed facts presented. Plaintiffs appeal. They contend that setting aside the first sale was not proper and that the second sale was void because it was made too soon after expiration of a temporary restraining order. We affirm.

#### FACTS AND PROCEDURE

In October 1998, West Coast Relocatables, Inc. (West Coast) executed a promissory note in the principal amount of \$485,000 in favor of Pacific National Bank, N.A. (Pacific), CNB's predecessor in interest. West Coast secured the note by executing and delivering to Pacific a written deed of trust conveying all of its interest in certain real property. In December 2001, ILS became trustee under the deed of trust. West Coast later defaulted on its obligation under the note and deed of trust.

In September 2002, ILS issued a notice of trustee's sale pursuant to the provisions of the deed of trust. The notice of sale provided the total amount of the unpaid balance of the obligation was \$511,971.17.

On the morning of the sale on October 15, 2002, three potential bidders attempted to qualify to bid on the subject property. Plaintiffs qualified to bid at the sale by presenting cashier's checks totaling \$449,000. A second bidder also qualified to bid.

A third potential bidder, Randall Olsen, attempted to qualify to bid. At the time of the sale, Olsen was the secretary and treasurer of Building Materials Distributors, Inc., a California corporation. Olsen presented to the auctioneer seven cashier's checks, payable to "BMD" and totaling \$640,000.

The notice of sale stated that cashier's checks were an acceptable form of payment, but checks drawn directly by a company on its own local account were not. The auctioneer informed ILS that the instruments Olsen presented were only "company check[s]." Based upon the description of the checks, ILS instructed the auctioneer not to qualify Olsen as a bidder. The auctioneer told Olsen he was not qualified to bid and, therefore, not allowed to bid at the sale.

The sale proceeded and Olsen did not participate in the bidding. Plaintiffs were the high bidders with a bid of \$430,100. They tendered cashier's checks totaling \$449,000 to the auctioneer, with the understanding that they would receive a refund of the amount by which they overpaid. Plaintiffs' winning bid was \$209,900 less than the total amount of the cashier's checks Olsen presented to the auctioneer. Had Olsen been allowed to bid, he would have bid a higher amount than plaintiffs' winning bid of \$430,100.

Subsequently, ILS discovered that Olsen had presented cashier's checks, not company checks. Based on this information, ILS determined that Olsen had been improperly disqualified from bidding. ILS refused to complete the sale and

did not deposit plaintiffs' funds or issue to them a trustee's deed upon sale. ILS conducted a second trustee's sale on January 6, 2003. Plaintiff MacIntyre attended the second sale, but plaintiffs did not attempt to qualify for the sale and did not participate in the bidding. Olsen qualified for the sale and participated in the bidding. However, another bidder, Realty Advisors, Inc. was the high bidder with a bid of \$615,000. A trustee's deed upon sale was recorded on February 5, 2003.

In their complaint, plaintiffs asserted eight causes of action against ILS, including quiet title, constructive trust, declaratory relief, specific performance, cancellation of instrument, breach of contract, breach of statutory duty, and professional negligence. Plaintiffs also asserted their quiet title and declaratory relief causes of action against CNB.

ILS filed a demurrer to the cause of action for breach of statutory duty, which the trial court sustained. ILS and CNB thereafter filed a motion for summary judgment or alternatively summary adjudication on the remaining causes of action set forth in the first amended complaint. Based upon the evidence presented, the court determined and ruled that there was no triable issue as to any material fact and that ILS and CNB were entitled to judgment as a matter of law.

On March 14, 2005, plaintiffs filed an application to modify the court's summary judgment ruling. The court treated the application to modify as a motion for reconsideration and denied it by order dated April 15, 2005. On March 29, 2005, the

court filed an order granting summary judgment in favor of ILS and CNB, and entered a judgment of dismissal.

Because ILS and CNB have common interests in this action and are jointly represented, we will refer, for simplicity, to ILS only, with the understanding that our discussion resolves the issues with respect to CNB too.

#### DISCUSSION

Although plaintiffs do not clearly set forth their contentions on appeal in proper headings, mixing contentions with general statements of law (see Cal. Rules of Court, rule 14(a)(1)), it appears plaintiffs' main contention is that ILS has not shown it properly set aside the sale based on Olsen's disqualification as a bidder. As did the trial court, we conclude ILS has sufficiently shown it was justified in setting aside the sale as a result of disqualifying Olsen based on the mistaken impression that he had presented company checks, rather than cashier's checks, in his attempt to qualify.

"It is well established that a trustee's duty at a foreclosure sale is to obtain the highest possible price for the property consonant with the protection and preservation of the trustor/debtor's interest. [Citation.] The beneficiary under a deed of trust is entitled to recover the balance of money owing on the original indebtedness, plus interest and expenses incurred while protecting the investment. The purpose of the sale is to satisfy the total indebtedness from cash or its equivalent bids." (*Baron v. Colonial Mortgage Service Co.* (1980) 111 Cal.App.3d 316, 322 (*Baron*).) "Courts have also

enunciated a duty in the trustee in the conduct of a sale itself. 'A sale under a power in a mortgage or trust deed must be conducted in strict compliance with the terms of the power. The sale must be made fairly, openly, reasonably, and with due diligence and sound discretion to protect the rights of the mortgagor and others, using all reasonable efforts to secure the best possible or reasonable price.' [Citation.] That duty may thus fairly be said to extend to all participants in the sale, including prospective bidders." (*Id.* at pp. 323-324.)

Here, it was ILS's duty to Olsen, a prospective and improperly disqualified bidder, that ILS sought to fulfill by setting aside the sale to plaintiffs. Although plaintiffs tacitly agree ILS had a duty to Olsen, they assert ILS has not produced evidence of a procedural flaw justifying ILS's actions.

"'A properly conducted nonjudicial foreclosure sale constitutes a final adjudication of the rights of the borrower and lender. [Citation.]' [Citation.] However, the conclusive presumption in favor of the bona fide purchaser (Civ. Code, § 2924) does not take effect until delivery of a trustee's deed. 'Although a nonjudicial foreclosure sale is generally complete upon acceptance of a bid by the trustee, the conclusive presumption does not apply until a trustee's deed is delivered. Thus, if there is a defect in the procedure which is discovered after the bid is accepted, but prior to delivery of the trustee's deed, the trustee may abort a sale to a bona fide purchaser, return the purchase price and restart the foreclosure process. [Citations.] [¶] . . . [A]n irregularity in the

nonjudicial foreclosure sale coupled with a gross inadequacy of price may be sufficient to set aside the sale, where the conclusive presumption does not come into effect because the trust deed has not yet been delivered. [Citation.]' [Citation.]" (*Angell v. Superior Court* (1999) 73 Cal.App.4th 691, 700.)

In *Baron*, the auctioneer refused to qualify bidders solely because the bidders presented cashier's checks payable to themselves, not to the trustee. The trial court determined that it was customary for bidders to present cashier's checks payable to themselves to qualify, but the court further found the auctioneer had absolute discretion concerning what form of payment to accept. Therefore, the trial court held that the disqualified bidders did not have recourse for the auctioneer's refusal to accept the cashier's checks payable to the prospective bidders instead of the trustee. (*Baron, supra*, 111 Cal.App.3d at pp. 320-321.) The Court of Appeal disagreed, finding the trial court should have granted injunctive relief to the disqualified bidders: "Since the trustee's sole obligation is to obtain the highest possible price, payable in 'good' money, needed to satisfy the indebtedness owed the beneficiary and recover for the trustor as much equity as possible, discretion ought to be measured, not by absolute terms, but by whether its exercise serves to promote competitive bidding by reliable bidders to secure the best possible price. The exercise of reasonable business prudence on the part of the trustee in acceptance of cash equivalents would protect all

parties under the statutory scheme, as the statute now expressly recognizes." (*Id.* at p. 323.)

The trial court relied on *Baron* in granting summary judgment. It reasoned: "[T]he error in refusing to permit a qualified bidder to participate in the foreclosure sale was a patent defect in the procedure that, prior to delivery of the trustee's deed, justified ILS as the trustee aborting the October 15, 2002 sale to the Plaintiffs, returning their purchase price and restarting the foreclosure process, to fulfill ILS's duty to the other qualified prospective bidders in the sale. The bidders at a real property foreclosure sale of property of a debtor under a deed of trust aggrieved by a trustee's breach of his duty under Civil Code section 2924h(b), to exercise reasonable discretion in qualifying the bidders at the sale, may obtain injunctive relief restraining the sale, or a rescission of an improperly conducted sale. [Citation.] Again, while Plaintiffs attempt to distinguish *Baron* on the grounds that here the 'aggrieved party' is not Olsen, who was precluded from bidding at the October 15, 2002 sale, that distinction is without merit. The *Baron* court makes clear that ILS's failure to permit a qualified bidder to participate in the October 15, 2002 sale was a procedural irregularity in the sale. [Citation.] Here, ILS and CNB assert that allowing the October 15, 2002 trustee's sale to stand would have been inequitable to the erroneously disqualified bidder, to the beneficiary and to the trustor. The holding in *Baron, supra*, required rescission



of the sale where a bidder was erroneously disqualified." This analysis properly applies *Baron*.

A. *Factual Issues*

Notwithstanding this analysis, plaintiffs assert ILS cannot prevail because it did not present evidence establishing that Olsen was a qualified bidder. In particular, plaintiffs claim ILS was required to present evidence that (1) Olsen was authorized to negotiate the cashier's checks he brought to the sale, (2) the checks were negotiable, and (3) the checks made out to "BMD" were checks to Building Materials Distributors, Inc., Olsen's employer. Plaintiffs, however, provide no authority for the proposition that, to obtain summary judgment, ILS had to show that Olsen could have successfully consummated the sale with the cashier's check if he had been the highest bidder. Instead, the proof plaintiffs say was lacking is immaterial to the issues at hand. ILS could have exercised its discretion with reasonable business prudence to take the cashier's checks proffered by Olsen without any further investigation. (See *Baron, supra*, 111 Cal.App.3d at p. 323.) That would have qualified Olsen to bid. Instead, ILS disqualified Olsen for a mistake of fact, which was an abuse of discretion. There is no authority stating that a trustee must go beyond the presentation of cashier's check and determine the kinds of questions to which plaintiffs now demand answers before qualifying a bidder and accepting bids. To the contrary, such a pronouncement from this court would interfere unnecessarily with

the trustee's discretion in accepting forms of payment. (See Civ. Code, § 2924h, subd. (b).)

A trustee can require a prospective bidder to present "a cashier's check drawn on a state or national bank" to qualify to bid. (Civ. Code, § 2924h, subd. (b).) Here, the auctioneer mistakenly thought Olsen was presenting company checks. ILS was not authorized to disqualify Olsen from bidding on this basis.

Plaintiffs contend ILS did not present evidence that Olsen was disqualified based on the mistake concerning the cashier's checks. Fact number 29 in ILS's statement of undisputed facts read: "Upon discovery of the procedural flaw in the sale, i.e., the improper disqualification of a qualified bidder, ILS refused to complete the sale by depositing Plaintiffs' funds or issuing a Trustee's Deed Upon Sale to Plaintiffs." While it is true that ILS did not list as an undisputed fact that Olsen was disqualified because of the mistake concerning the cashier's checks, the statement of undisputed facts states that Olsen presented cashier's checks, the auctioneer thought they were company checks and so informed ILS, and ILS instructed the auctioneer not to qualify Olsen. No reason, other than the mistake concerning the checks, appears on this record for ILS to refuse to qualify Olsen. Accordingly, the only reasonable conclusion is that Olsen was disqualified because of the mistake concerning the checks.

Plaintiffs further contend that there was no evidence ILS set aside the sale because of the procedural flaw. They offer no authority for the implicit assertion that ILS's state of mind

at the time it set aside the sale was material to this action. The only citations to authority plaintiffs provide in this section concern the importance of setting forth facts in the separate statement. (*Amato v. Mercury Casualty Co.* (1993) 18 Cal.App.4th 1784, 1794 [court may treat as abandoned any contention for which no authority provided].) What ILS was thinking when it set aside the sale does not seem to us important; the setting aside followed a procedural flaw in the sale. The authority we have already discussed supported that action.

B. *Legal Issues*

Under the heading of "ERRORS OF LAW WERE MADE IN THE TRIAL COURT," plaintiffs again make the argument that there was no showing Olsen was a qualified bidder. They declare, in bold text, "**Neither the statutory framework nor case law provide that submitting cashiers checks to the crier makes a bidder qualified.**" This is nothing more than a straw man argument. Plaintiffs' statement is true; there can be reasons to disqualify a bidder who presents cashier's checks. But that is not the question here. Olsen presented cashier's checks and ILS refused to qualify Olsen because it believed the checks were company checks. That refusal was an abuse of discretion. When ILS decided to set aside the sale and qualify Olsen for a new sale, it was not an abuse of discretion (1) not to investigate Olsen to determine whether he had authority to negotiate the checks, even though ILS could have done so if it wished (Civ. Code, § 2924h, subd. (b)), and (2) to overlook such trivial

matters as whether "BMD" was an actual fictitious business name for Building Materials Distributors, Inc., Olsen's employer.

Plaintiffs also assert, in another straw man argument, that *Baron* "does not stand for the proposition that a trustee can rescind a sale as a result of its disqualification of a bidder." (Underling omitted.) Again, this is technically true because *Baron* involved an aggrieved bidder who sought injunctive relief against the trustee. Just as true, plaintiffs' statement does not support their argument that summary judgment was improperly granted. More generally, *Baron* established that, when a trustee's sale is marred by a procedural irregularity resulting in a reduction of the pool of bidders and their funds, the trustee has breached its duty to, among others, the excluded bidders. Allowing the trustee to set aside the problematic sale, though not the result in *Baron* because the trustee there went forward with the sale, is the logical conclusion one reaches in applying *Baron* to the facts of this case. As noted above, an irregularity in the proceedings may justify setting aside the sale. (*Angell v. Superior Court, supra*, 73 Cal.App.4th at p. 700.)

Plaintiffs cite *6 Angels, Inc. v. Stuart-Wright Mortgage, Inc.* (2001) 85 Cal.App.4th 1279 (*6 Angels*) for the proposition that ILS could not set aside the sale based on its unilateral mistake. The case, however, does not support their argument. In *6 Angels*, a deed of trust secured an indebtedness of \$144,656. On the day of the trustee's sale, the beneficiary mistakenly set the opening bid on the property at \$10,000

instead of \$100,000. The winning bid was for \$10,001. After the sale was set aside, the buyer sued to enforce it and won in the trial court. (*Id.* at pp. 1282-1283.) On appeal, the court agreed that the beneficiary, the party that would have the benefit of the proceeds from the sale, could not have the sale set aside for its own mistake *because there was no procedural defect in the sale.* (*Id.* at pp. 1284-1285.) Here, the improper disqualification of Olsen was a procedural defect which resulted in a lower winning bid. *6 Angels*, therefore, does not support plaintiffs' argument.

The remedy to which a winning bidder is entitled when a sale is properly set aside is limited to return of the sale price plus accrued interest. (*Residential Capital v. Cal-Western Reconveyance Corp.* (2003) 108 Cal.App.4th 807, 822.) Plaintiffs assert they should not be limited to that remedy because, unlike in *Residential Capital* where the sale did not comply with the statutory procedural requirements, the defect here was Olsen's disqualification because of ILS's mistake concerning the nature of the checks Olsen proffered. Contrary to plaintiffs' argument, the defect here was of a statutory procedural requirement: Civil Code section 2924h, subdivision (b) allows a bidder to present cashier's checks as a form of payment. Therefore, Olsen's disqualification based on the nature of his checks violated the statute.

#### C. *Timing of Second Sale*

Plaintiffs assert the second sale, held on January 6, 2003, is void because it was held too soon after expiration of a

temporary restraining order.<sup>1</sup> They fail, however, to show how they have standing to challenge this sale, which took place after ILS set aside the sale to plaintiffs. In any event, the trial court expressly allowed the second sale to go forward on January 6.

After ILS set aside the first sale, plaintiffs sought injunctive relief to prevent a second sale. The trial court issued a temporary restraining order and set the matter for a hearing on a preliminary injunction. The court heard argument and took the matter under consideration. It extended the temporary restraining order to January 6, 2003. On December 31, 2002, it issued an order which reads, in part: "[T]he court vacates its tentative ruling and denies the application for preliminary injunction enjoining the trustee from proceeding with the foreclosure sale now re-noticed for January 6, 2003." The second sale took place as scheduled.

Civil Code section 2924g, subdivision (d) states, in pertinent part: "[T]he sale shall be conducted no sooner than on the seventh day after the earlier of (1) dismissal of the action or (2) expiration or termination of the injunction, restraining order, or stay that required postponement of the sale, whether by entry of an order by a court of competent jurisdiction, operation of law, or otherwise, unless the

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<sup>1</sup> Oddly, this contention is included among contentions concerning the validity of the first sale in plaintiffs' opening brief. We have separated it from those contentions as it logically has no place with them.

injunction, restraining order, or subsequent order expressly directs the conduct of the sale within that seven-day period."

Here, the sale took place on the sixth day after the trial court denied the preliminary injunction. However, the court's order authorized the sale "re-noticed for January 6, 2003," to go forward. Accordingly, the second sale did not violate Civil Code section 2924g, subdivision (d).

In any event, plaintiffs have no standing to challenge the second sale. In the order granting summary judgment, the trial court noted: "Plaintiffs do not have standing to contend that the second trustee's sale conducted on January 6, 2003 is void." In their opening brief, plaintiffs make no mention of this problem and offer no answer. We agree with the trial court. The trustee properly set aside the first sale. Plaintiffs, one of whom attended the second sale but did not bid, have asserted no right with respect to the second sale that they have standing to enforce.

#### DISPOSITION

The judgment is affirmed.

NICHOLSON, J.

We concur:

DAVIS, Acting P.J.

BUTZ, J.